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8

9 **UNITED STATES BANKRUPTCY COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN FRANCISCO DIVISION**

12 In re:

13 GABRIEL TECHNOLOGIES  
CORPORATION *et al.*,

14 Debtors.  
15

16 E.I.N. 22-3062052; 20-1711149  
17

Case No. 13-30340-DM

(Jointly Administered with Case No. 13-30341)

Chapter 7 Proceedings

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF CHAPTER 7  
TRUSTEE'S MOTION FOR APPROVAL OF  
SETTLEMENT WITH HUGHES HUBBARD &  
REED LLP**

**[Fed. R. Bankr. P. 9019]**

[Notice of Motion, Motion, and supporting Declarations  
filed concurrently herewith]

Hearing:

Date: September 16, 2016

Time: 10:00 a.m.

Place: Courtroom 17

United States Bankruptcy Court  
450 Golden Gate Avenue, 16<sup>th</sup> Floor  
San Francisco, California 94102

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1 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY COURT**  
2 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL PARTIES IN**  
3 **INTEREST:**

4 Kavita Gupta, the chapter 7 trustee (the "Trustee") for the bankruptcy estates of Debtor  
5 Gabriel Technologies Corporation, Bankruptcy Case No. 13-30340, and Debtor Trace Technologies,  
6 LLC, Bankruptcy Case No. 13-30341 (collectively, the "Estates"), pursuant to Rule 9019 of the  
7 Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 105, provides the following Memorandum  
8 of Points and Authorities in support of her Motion for Approval of Settlement Agreement With  
9 Hughes Hubbard & Reed LLP (filed concurrently herewith), seeking an order authorizing and  
10 approving a settlement (the "Settlement") by and between the Trustee and Hughes Hubbard & Reed  
11 LLP ("Hughes Hubbard"), and for a finding that the Settlement is fair and reasonable and in the best  
12 interest of the creditors of the Estates (the "9019 Motion").

13  
14 Dated: August 10, 2016

BRUTZKUS GUBNER

15  
16  
17 By: /s/ Larry W. Gabriel  
18 Larry W. Gabriel  
19 Special Litigation Counsel for Kavita Gupta,  
20 Chapter 7 Trustee for the bankruptcy estates  
21 of Gabriel Technologies Corporation and  
22 Trace Technologies, LLC  
23  
24  
25  
26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. JURISDICTION AND VENUE**

3 The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is  
4 proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding  
5 pursuant to 28 U.S.C. §157(b)(2). The statutory predicate for the relief sought in the Motion is  
6 Federal Rule of Bankruptcy Procedure 9019 and 11 U.S.C. § 105.

7 **II. INTRODUCTION**

8 This 9019 Motion requests that the Court approve an agreement to settle and resolve any  
9 and all claims that the Trustee alleges she has or may have against the Debtors' former litigation  
10 counsel, Hughes Hubbard, including certain present and former lawyers at Hughes Hubbard and  
11 others related to Hughes Hubbard, in connection with and arising out of (a) its representation of the  
12 Debtors in the action titled *In re Gabriel Technologies Corporation and Trace Technologies, LLC*  
13 *v. Qualcomm Incorporated, Snaptrack, Inc. and Norman Krasner*, Case No. 08-CV-1992, which  
14 was pending in the United States District Court for the Southern District of California, and the  
15 appeal thereof entitled *Gabriel Technologies Corporation and Trace Technologies, LLC v.*  
16 *Qualcomm Incorporated, Snaptrack, Inc. and Norman Krasner*, Case No. 13-1205, which was  
17 pending in the United States Court of Appeals for the Federal Circuit (collectively, the "Action"),  
18 and (b) their alleged efforts and opinions provided to secure funds from any Person or entity to pay  
19 the fees, expenses and costs of the Action (all of the foregoing claims and any other matter related  
20 in any way to the Debtors or the Estates are referred to collectively as the "Professional Negligence  
21 Claims").

22 The settlement will result in the Trustee's recovery of \$7.25 million for the benefit of the  
23 Estates. The settlement was reached after the Parties engaged in a full-day mediation with the  
24 Honorable Edward Infante (Ret. Chief Magistrate Judge of the United States District Court for the  
25 Northern District of California) of JAMS on March 7, 2016, and continued discussions between the  
26 mediator and the Parties following the mediation, and subsequently, the Parties' acceptance of a  
27 mediator's proposal.  
28

1 Given the amount of the settlement, the claims to be resolved, and the cost of litigation  
2 saved by the estate, the Trustee believes that the settlement is in the best interests of the Estates,  
3 and should result in providing significant funds to distribute to creditors. (Gupta Declaration ¶¶ 14-  
4 20.) Based on the grounds stated herein and in the Gupta Declaration and Gabriel Declaration, the  
5 Trustee respectfully requests that the Court grant this Motion and enter an order:

- 6 1. Approving the terms and conditions of the settlement as embodied in the Settlement  
7 Agreement;
- 8 2. Authorizing the Trustee to execute any documents or take any actions reasonably  
9 necessary to effectuate the terms of the Settlement Agreement; and
- 10 3. Granting such other and further relief as the Court may deem just and proper.

### 11 **III. BACKGROUND ON THE CLAIMS**<sup>1</sup>

#### 12 **A. The Underlying Litigation**

##### 13 **1. Background Regarding the Claims in the Underlying Litigation**

14 Gabriel Technologies Corporation (“Gabriel”) was a publicly traded Delaware corporation  
15 that focused on technologies related to asset tracking and physical security. In late 1998, the  
16 founders of another company, Locate Networks, LLC (“Locate”), and its principals started  
17 discussing joint development projects with Norman Krasner (“Krasner”) and SnapTrack Inc.  
18 (“SnapTrack”). Locate focused on location determining devices and location-based services;  
19 SnapTrack developed broadband network and assisted Global Positioning System (“aGPS”)  
20 technology.

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21  
22  
23 <sup>1</sup> The facts presented are based upon the factual findings as described in various court decisions  
24 involving the Debtors and Qualcomm. *See generally, Gabriel Technologies Corporation et al. v.*  
25 *Qualcomm Inc., et al.*, Case No. 3:2008-cv-01992-AJB-MDD; *Gabriel Technologies*, 2013 WL  
26 410103 (S.D. Cal. 2013) (the “Fee Order”); *Gabriel Technologies Corporation and Trace*  
27 *Technologies, LLC v. Qualcomm Incorporated, Snaptrack, Inc. and Norman Krasner*, Case No. 13-  
28 1205 (Fed. Cir.). Copies of these pleadings are attached to the Request for Judicial Notice in  
Support of: (1) Trustee’s Motion for Approval of Settlement with Hughes Hubbard & Reed, LLP  
and, (2) Trustee’s Motion for Good Faith Determination Regarding the Settlement Between Kavita  
Gupta, as Chapter 7 Trustee for Consolidated Estates, and Hughes Hubbard & Reed, LLP (the  
“RJN”).

1 On August 20, 1999, SnapTrack and Locate entered into a license agreement (the “1999  
2 Agreement”). The 1999 Agreement set forth the terms under which Locate obtained from  
3 SnapTrack a license to use SnapTrack’s aGPS software in exchange for paying SnapTrack  
4 licensing and royalty fees. The parties also agreed to jointly own “Program Technology,” defined  
5 as work product carried out by the parties in connection with the 1999 Agreement, and identified as  
6 Program Technology in the agreement.

7 Gabriel believed that SnapTrack and Krasner used the relationship created by the 1999  
8 Agreement to obtain millions of dollars from Locate to keep SnapTrack afloat while negotiating a  
9 billion dollar buyout of SnapTrack.

10 In March 2000, Qualcomm Inc. (“Qualcomm”) acquired SnapTrack for \$1 billion, stating  
11 in its press release that SnapTrack’s patents were necessary for the commercial viability of any  
12 Wireless Assisted GPS System.”

13 In 2004, Locate sold its assets to Trace Technologies, LLC (“Trace”), transferred its interest  
14 in Trace to Gabriel, and went out of business. Qualcomm then presented Trace, the successor in  
15 interest to Locate’s assets, with a proposed amended license agreement. The proposed amended  
16 license agreement deleted the relevant section of the 1999 Agreement which stated that “[a]ll  
17 Program Technology was jointly owned by the parties.”

18 On January 16, 2006, Trace and Qualcomm entered into the amended license agreement.  
19 Gabriel believed at the time that SnapTrack had misappropriated Locate’s intellectual property and  
20 technology without Trace’s knowledge or consent. Gabriel also believed that Krasner secretly filed  
21 and obtained numerous patents based on Locate’s technology, which he was able to access when  
22 the parties entered into the 1999 Agreement. Once Qualcomm acquired SnapTrack, Gabriel  
23 believed that Qualcomm continued filing patents based on Locate’s technology.

24 Gabriel believed that at least 92 U.S. and foreign patents and patent applications filed by  
25 Krasner and Qualcomm should have listed Locate employees as the sole inventors, or at least joint  
26 inventors. Over time, as the patents became publicly available, Gabriel discovered certain patents  
27 that incorporated Locate’s pre-existing technology and jointly owned Program Technology.  
28 Gabriel brought its issues to the attention of Qualcomm in an attempt to resolve the issues before

1 instituting litigation. This effort proved unsuccessful, and Gabriel decided to file suit based upon  
2 the claims it perceived Gabriel owned.

## 3                   **2. The Underlying Litigation and the Retention of Hughes Hubbard**

4           Gabriel filed its original complaint against Qualcomm on October 24, 2008 (the Action”).  
5 At the time, Gabriel was represented by a Texas-based law firm, Munck Carter, P.C. In April  
6 2009, Gabriel retained another firm, WHGC, P.L.C., and Wang Hartman Gibbs & Cauley, P.L.C  
7 (“WHGC”), as local counsel.

8           The original complaint contained eleven causes of action against Qualcomm. The  
9 complaint asserted that SnapTrack had misappropriated intellectual property belonging to Locate,  
10 Gabriel’s predecessor in interest. Gabriel claimed that Qualcomm used Locate’s technology  
11 without giving Locate proper attribution as the inventors or co-inventors.

12           In or around December 2009, Munck Carter withdrew based on a conflict of interest. In  
13 about March 2010, Gabriel’s board of directors retained Hughes Hubbard to replace Munck Carter  
14 as lead counsel.

15           On July 2, 2010, Qualcomm moved to have Gabriel post a bond pursuant to California  
16 Code of Civil Procedure § 1030 to secure costs and fees. In support of its request, Qualcomm  
17 argued that it had defeated seven of Gabriel’s eleven claims, that Gabriel had failed to produce any  
18 facts during discovery to support the remaining causes of action and that certain claims were barred  
19 by the applicable statute of limitations. In opposition, Gabriel argued, among other things, that  
20 multiple experts supported its position and that various discovery orders by the magistrate judge  
21 had deprived Gabriel of important discovery.

22           On September 20, 2010, U. S. District Judge Michael M. Anello granted Qualcomm’s  
23 motion for a bond and ordered Gabriel to post an \$800,000 bond.<sup>2</sup> Gabriel posted the bond on  
24 December 16, 2010.

25           During the course of the litigation, the trial court determined that Gabriel was unable to  
26 articulate its trade secrets with adequate particularity. Gabriel filed various briefs explaining why

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27  
28 <sup>2</sup> *Gabriel Technologies Corporation et al. v. Qualcomm Inc., et al.*, Case No. 3:2008-cv-01992-AJB-MDD, Docket No. 110 (the “Bond Order”). A copy of the Bond Order is attached to the RJN.



1 it believed it had articulated its trade secrets with sufficient particularity. Based on its conclusion  
2 that Gabriel had not done so, and a later finding that some claims were barred by the statute of  
3 limitations, the trial court granted Qualcomm's two successive motions for summary judgment,  
4 eventually dismissing the Action and all of the Debtors' claims.

5 The dismissal of the Action was followed by a motion by Qualcomm, pursuant to 35 U.S.C.  
6 § 285, seeking an award of attorneys' fees against Gabriel and its attorneys of record, Hughes  
7 Hubbard and its local counsel, WHGC, in an amount exceeding \$13.5 million. Hughes Hubbard,  
8 due to a conflict of interest, retained its own counsel, Latham & Watkins, LLP, and arranged for  
9 the firm Fitzgerald Knaier LLP, f/k/a Chapin Fitzgerald Knaier LLP, ("Fitzgerald"), to represent  
10 the Debtors. After presenting its opposition to the motion, Hughes Hubbard settled with  
11 Qualcomm prior to the hearing on the Motion. After the hearing, the Court awarded Qualcomm all  
12 of its fees incurred in defense of the action, less the amount of the bond previously posted.

13 Pursuant to the Fee Order, the Debtors were ordered to pay attorneys' fees in the amount of  
14 \$12,401,014.51, including forfeiture of the \$800,000 bond posted by the Debtors.

15 On February 14, 2013, the Debtors filed for bankruptcy. The judgment against the Debtors  
16 was thereafter affirmed on appeal. *Gabriel Technologies Corporation v. Qualcomm Incorporated*,  
17 560 Fed. Appx. 966 (Fed. Cir. 2014).

## 18 **B. The Bankruptcy Proceedings**

19 On February 14, 2013, Gabriel and Trace commenced these bankruptcy cases by each filing a  
20 voluntary petition under Chapter 11 of the United States Bankruptcy Code in the United States  
21 Bankruptcy Court, Northern District of California, San Francisco Division (the "Court"), under the  
22 jointly administered Case No. 13-30340-DM. (Docket Nos. 1, 19.)

23 On July 8, 2014, this Court entered an order converting the Debtors' Chapter 11 cases to  
24 Chapter 7 cases. (Docket No. 239.) The Trustee was subsequently selected to serve as the Chapter 7  
25 Trustee. (Docket No. 250.)

## 26 **C. The Trustee's Claims**

27 The Trustee's claims against Hughes Hubbard are essentially for negligence and breach of  
28 fiduciary duty in relation to Hughes Hubbard's representation of the Debtors in the Action. The

1 Trustee's claims are identified in more detail in the Settlement Agreement. Hughes Hubbard will  
2 likely contend that the claims have no merit and are subject to applicable defenses.

3 **D. Tolling Stipulations**

4 At the outset of the bankruptcy proceedings, Hughes Hubbard, along with the other law  
5 firms that represented the Debtors in the Action, were put on notice of the Trustee's potential  
6 claims against them. The Trustee thereafter entered into tolling stipulations and amendments  
7 extending the time for the Trustee to file an action against Hughes Hubbard through December 31,  
8 2016. Based on the tolling stipulations and amendments, the Trustee has not yet filed an adversary  
9 proceeding or arbitration proceeding against Hughes Hubbard.

10 **E. The Mediations with Hughes Hubbard and the Debtors' Other Counsel**

11 The Trustee originally retained Brown Rudnick LLP as her special litigation counsel to  
12 analyze and pursue claims against Hughes Hubbard and WHGC. (Docket No. 289.) Shortly  
13 thereafter a mediation took place between the Trustee and Hughes Hubbard with Robert A. Meyer  
14 of Loeb & Loeb LLP serving as the mediator. That mediation was unsuccessful as the Trustee and  
15 Hughes Hubbard were unable to reach an agreement. (Gupta Declaration, ¶¶ 8-9.)

16 In September 2015, the Trustee terminated Brown Rudnick LLP and substituted Brutzkus  
17 Gubner Rozansky Seror Weber LLP ("Brutzkus Gubner") as her special litigation counsel.  
18 (Docket Nos. 259, 306.) (Gupta Declaration, ¶10.)

19 On March 7, 2016, another mediation took place using the services of Judge Edward  
20 Infante (Ret.) of JAMS serving as the mediator. Unlike the first mediation, this mediation was a  
21 global mediation involving the Trustee, Hughes Hubbard, WHGC and Fitzgerald (Fee Motion and  
22 appellate counsel) that also represented the Debtors in the Action. At the mediation, the Trustee  
23 resolved her claims against WHGC and that settlement is being presented to this Court for approval  
24 concurrently with the filing of this motion. Following the mediation, Judge Infante, the Trustee,  
25 and Hughes Hubbard continued discussions, and the Trustee and Hughes Hubbard agreed to the  
26 mediator's proposal. The mediator's proposal resulted in the Settlement Agreement with Hughes  
27 Hubbard. (Gupta Declaration, ¶¶ 11, 13.)

28 ///

1           **F.       The Trustee's Remaining Claims Against Other Counsel**

2           The Trustee has also asserted claims against Fitzgerald. The Trustee was unable to resolve  
3 her claims against Fitzgerald, and she is proceeding with an arbitration on those claims. (Gupta  
4 Declaration, ¶ 12.)

5           **G.       The Settlement Agreement Terms**

6           All parties in interest are directed to the Settlement Agreement which is attached as **Exhibit**  
7 **1** to the Gupta Declaration, for the specific terms of the Settlement Agreement. A summary of the  
8 essential terms in the Settlement Agreement are set forth below. To the extent that any terms listed  
9 below are inconsistent with the Settlement Agreement, the terms of the Settlement Agreement  
10 govern:

- 11           1. The Settlement Agreement is conditional upon the Bankruptcy Court's approval of  
12           the Settlement Agreement pursuant to Federal Rule of Bankruptcy Procedure 9019.
  - 13           2. The Settlement Agreement is conditional upon the Bankruptcy Court's finding that  
14           the Settlement Agreement was entered into in good faith, pursuant to California  
15           Code of Civil Procedure § 877.6.
  - 16           3. Hughes Hubbard shall pay the Trustee the total sum of \$7,250,000.00 (the  
17           "Settlement Amount") within five business days after: (a) the Court order approving  
18           this Settlement Agreement becomes Final, and (b) a Court order approving the  
19           Good Faith Settlement Motion becomes Final.
  - 20           4. Hughes Hubbard will waive any claim it has or may have against the Debtors or  
21           their Estates in their bankruptcy cases. To the extent that Hughes Hubbard filed a  
22           claim(s), such claims are disallowed in their entirety.
  - 23           5. The Parties have agreed to mutual and general releases and a Civil Code § 1542  
24           waiver.
  - 25           6. There is a carve-out regarding claims against certain parties as provided for in  
26           paragraphs 7 and 8 of the Settlement Agreement.
  - 27           7. Each Party will bear its own fees, costs and expenses.
- 28

1           8. The Bankruptcy Court will retain jurisdiction to enforce the terms of the Settlement  
2           Agreement.

3   **IV. THE COURT SHOULD APPROVE THE SETTLEMENT AGREEMENT**

4           Federal Rule of Bankruptcy Procedure 9019 states, in relevant part, that “[o]n motion by the  
5 trustee and after notice and a hearing, the court may approve a compromise or settlement.” Under  
6 Rule 9019(a), the Bankruptcy Court has “great latitude in approving compromise agreements” and  
7 may approve a proposed compromise so long as it is fair and equitable. *Woodson v. Fireman’s*  
8 *Fund Insurance Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1987).

9           The Ninth Circuit has set forth certain factors relevant to determining whether a settlement  
10 is fair and equitable. In determining whether a settlement is fair and equitable and in the best  
11 interests of the estate and creditors, the court must consider: “(a) the probability of success in the  
12 litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the  
13 complexity of the litigation involved, and the expense, inconvenience and delay necessarily  
14 attending it; and (d) the paramount interest of creditors and a proper deference to their reasonable  
15 views in the premises.” *Martin v. Kane (In re A&C Props.)*, 784 F.2d 1377, 1381 (9th Cir. 1986),  
16 *overruled on other grounds by In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349 (9th  
17 Cir. 1987).

18           The decision of whether to approve or reject a proposed compromise is addressed to the  
19 sound discretion of the Court and is to be determined by the particular circumstances of each case.  
20 *In re Walsh Construction, Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982); *In re Woodson, supra*, at 620;  
21 *In re A & C Properties, supra*, at 1381.

22           In addressing this Motion, the Court need not decide the questions of law and fact raised in  
23 the controversies sought to be settled and need not determine whether the settlement presented is  
24 the best one that could possibly have been achieved. Rather, the Court’s responsibility is only “to  
25 canvass the issues to see whether the settlement ‘fall[s] below the lowest point in the range of  
26 reasonableness.’” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (*quoting Newman v.*  
27 *Stein*, 464 F.2d 683, 693 (2d Cir. 1972); *see In re Milden*, 111 F.3d 138, 2 (9th Cir. 1997); *In re*  
28 *Pac. Gas and Elec. Co.*, 304 B.R. 395, 417 (Bankr. N.D. Cal. 2004). The bankruptcy court need

1 not conduct an exhaustive investigation into the validity or a mini-trial on the merits of the claims  
2 sought to be compromised. *In re Walsh Constr.*, 669 F.2d at 1328.

3 An analysis of the *A&C Properties* factors in this case, as set forth below and in the Gupta  
4 Declaration and Gabriel Declaration, demonstrates that the settlement is fair and equitable, and  
5 should be approved.

6 **A. The Probability of Success in the Litigation**

7 The Settlement Agreement represents the product of an extensive evaluation of the  
8 potential claims the Estates have or may have against Hughes Hubbard. (Gupta Declaration, ¶ 15.)  
9 The Trustee believes that it is probable that she would prevail if she pursued litigation against  
10 Hughes Hubbard. *Id.* The claims themselves present fairly straight-forward issues as to Hughes  
11 Hubbard's advice as to the propriety of continuing litigation after the Bond Order was issued by  
12 the District Court. *Id.* However, the Trustee recognizes that, as with all litigation, the outcome is  
13 ultimately uncertain and ultimately rests with the trier of fact. *Id.* The claims would likely require  
14 expert testimony, likely with two or three experts providing testimony on the issue of patent law,  
15 legal malpractice and billing practices. (Gabriel Declaration, ¶ 7.) In addition, it is possible that  
16 the claims would have to be arbitrated given the terms of the Hughes Hubbard's retention  
17 agreement with the Debtors. (Gupta Declaration, ¶ 18; Gabriel Declaration, ¶¶ 7, 10.) That  
18 agreement requires that the arbitration take place in New York, with New York law being applied  
19 to the claims presented. *Id.* Such an arbitration may result in increasing the expense for the  
20 prosecution of the claims, require the need to retain local counsel, and subject the claims to the  
21 vagaries of New York law. (Gabriel Declaration, ¶ 7.) Moreover, even if the Trustee prevailed in  
22 litigation against Hughes Hubbard, the amount of recovery is subject to dispute. (Gupta  
23 Declaration, ¶ 15; Gabriel Declaration, ¶ 8.) The Trustee has also analyzed the damage claim that  
24 could be pursued *vis a vis* the Hughes Hubbard claims. (Gupta Declaration, ¶ 16.) It is the  
25 Trustee's view that the approximate range of the Estates' potential damages against Hughes  
26 Hubbard is between \$13 million - \$20 million. (Gupta Declaration, ¶ 16; Gabriel Declaration, ¶ 8.)  
27 That amount includes the \$13 million Fee Order, interest on the Fee Order from the date it was  
28 entered, attorney fees, and the additional debt (now claims) the Debtors would not have otherwise

1 incurred but for the continuation of the Action. *Id.* Hughes Hubbard has asserted numerous  
2 defenses to the claims. (Gabriel Declaration, ¶ 9.) For example, it will likely contend that the Fee  
3 Order erroneously included approximately \$5 million in fees that were incurred prior to the Bond  
4 Order and that Fitzgerald, not Hughes Hubbard, is liable for failing to recognize and challenge this  
5 error. *Id.* Hughes Hubbard may further contend that the Debtors' board of directors was fully  
6 advised of the risk of litigation and that the Debtors would have likely continued with the Action  
7 because they had no profitable business operations. *Id.* Taking litigation risk and the time value of  
8 money into consideration, the Trustee believes that the settlement of \$7.25 million represents a  
9 reasonable and fair compromise that is between 36% - 56% of the Estates' total potential claim  
10 against Hughes Hubbard. (Gupta Declaration, ¶ 16.) The settlement takes into account the  
11 probability of success in litigation, and the Trustee believes that it is in the best interests of the  
12 Estates and their creditors. (Gupta Declaration, ¶¶ 15-19.) The Trustee does not believe that it is  
13 prudent to subject the Estates to the risks and costs associated with litigating the claims against  
14 Hughes Hubbard given the settlement amount of \$7.25 million should provide a substantial benefit  
15 to the creditors of the administratively insolvent estates. (Gupta Declaration, ¶ 16.) The Trustee  
16 believes, in her business judgment, that the proposed settlement is more beneficial to the Estates  
17 than the litigation of the claims against Hughes Hubbard. (Gupta Declaration, ¶¶ 16, 20.)

18 **B. The Difficulties, If Any, To Be Encountered In The Matter Of Collection.**

19 This test is not relevant. In the event of a judgment, the Trustee believes that she would be  
20 able to recover in full from Hughes Hubbard. (Gupta Declaration, ¶ 17.)

21 **C. The Complexity of the Litigation Involved and the Expense,**  
22 **Inconvenience and Delay Necessarily Attending It.**

23 The litigation against Hughes Hubbard would present fairly complex legal issues and  
24 hurdles. (Gupta Declaration, ¶ 18.) As has been made clear by Hughes Hubbard's counsel, the  
25 issues would be heavily litigated. (Gabriel Declaration, ¶ 10.) First, the Trustee will have to  
26 address a number of jurisdictional and choice of laws issues in regard to whether the claims would  
27 need to be arbitrated, and if so, where the arbitration would take place. (Gupta Declaration, ¶ 18;  
28 Gabriel Declaration, ¶ 10.) The retention agreement with Hughes Hubbard provides that any claim

1 against the firm be arbitrated in New York, and that New York law applies. (Gupta Declaration, ¶  
2 18; Gabriel Declaration, ¶ 7.) The Trustee believes that the Bankruptcy Court should adjudicate  
3 the claims against Hughes Hubbard, but it is possible that Hughes Hubbard would prevail in its  
4 argument that the claims should be arbitrated in New York. (Gupta Declaration, ¶ 18; Gabriel  
5 Declaration, ¶ 10.) Arbitration is often time-consuming and extremely costly. *Id.* To the extent  
6 that the arbitration was to take place in New York, and if New York law was applied, the Trustee  
7 and her counsel would likely incur significant travel expenses, and may also need to retain local  
8 counsel in New York to advise as to New York law. (Gupta Declaration, ¶ 18; Gabriel  
9 Declaration, ¶ 7.)

10 The Trustee has claims against Fitzgerald as heretofore expressed. (Gupta Declaration, ¶  
11 12.) Fitzgerald's retainer agreement with the Debtors requires an arbitration of the claims against it  
12 to be held in San Diego County. *Id.* Motions, and potentially time-consuming appeals, could take  
13 place over whether the claims are to be arbitrated, whether the claims against Hughes Hubbard and  
14 the other firms must be jointly arbitrated, where the arbitration would take place, and what state's  
15 law would be applied. (Gabriel Declaration, ¶ 10.)

16 Moreover, it is possible Hughes Hubbard would seek to have a "trial within a trial" in order  
17 to prove causation. Although the Trustee does not believe that a "trial within a trial" approach  
18 would apply, if it did, such an approach would be time-consuming, would likely involve two or  
19 more expert witnesses on each side, and would be costly. (Gabriel Declaration, ¶ 11.) The expert  
20 witness costs would likely exceed several hundred thousand dollars, at a minimum, and could  
21 ultimately reach close to \$1 million depending on the number of expert witnesses needed. *Id.*  
22 Even though the Trustee's counsel is retained on a contingency fee basis, fees and costs for  
23 arbitration, expert witnesses and other costs could be substantial if the Trustee were to litigate the  
24 claims against Hughes Hubbard. *Id.* In addition, while the Trustee is confident in her analysis of  
25 the claims and the likelihood of success on the merits, there is never any certainty to such claims,  
26 and the amount of the settlement is reasonable given the risks of litigation, and the years the  
27 litigation could take to conclude. (Gupta Declaration, ¶¶ 15-16; Gabriel Declaration, ¶ 11.)  
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1 The complexity of the litigation, expense, and potential delay due to issues regarding  
2 arbitration, all weigh in favor of resolving the claims against Hughes Hubbard to avoid significant  
3 cost, delay and risk. (Gupta Declaration, ¶¶ 15-19.) However, the amount of the settlement still  
4 must be fair and reasonable given the probability of success at trial. (Gupta Declaration, ¶ 18.) As  
5 discussed above, the Trustee believes that the Settlement Amount appropriately takes into account  
6 the range of potential outcomes for the claims taking into account the probability of success at trial.  
7 (Gupta Declaration, ¶¶ 18-19; Gabriel Declaration, ¶¶ 7-12.)

8 **D. Paramount Interests of Creditors.**

9 The Settlement Amount of \$7.25 million is significant and should provide for a substantial  
10 benefit to the Estates and creditors without the significant risks and costs of litigation. (Gupta  
11 Declaration, ¶ 19.) Given that the Estates are currently administratively insolvent, the Settlement  
12 Agreement should provide for a meaningful recovery for creditors of the Estates. *Id.* As will be  
13 set forth in a separate motion to approve a settlement agreement with WHGC, the Trustee has also  
14 resolved her claims against WHGC. *Id.* The Settlement Agreement preserves the Trustee's ability  
15 to pursue her claims against Fitzgerald, which may result in additional recovery for the Estates. *Id.*

16 Based on the *A&C Properties* factors, the Settlement Agreement is fair and equitable and in  
17 the best interest of the Estates and their creditors. (Gupta Declaration, ¶ 20.)

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1 **V. CONCLUSION**

2 Based on the grounds stated herein and in the Gupta Declaration and Gabriel Declaration,  
3 the Trustee respectfully requests that the Court grant this Motion and enter an order:

- 4 1. Approving the Settlement Agreement;
- 5 2. Authorizing the Trustee to execute any documents or take any actions reasonably  
6 necessary to effectuate the terms of the Settlement Agreement; and
- 7 3. Granting such other and further relief as the Court may deem just and proper.

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9 Dated: August 10, 2016

BRUTZKUS GUBNER

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11 By: /s/ Larry W. Gabriel

12 Larry W. Gabriel

13 Special Litigation Counsel for Kavita Gupta,

14 Chapter 7 Trustee for the bankruptcy estates

15 of debtors Gabriel Technologies Corporation

16 and Trace Technologies, LLC

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